The Washington Post Company and The Washington-Baltimore Newspaper Guild, Local 35, affiliated with The Newspaper Guild, AFL-CIO-CLC, Petitioner. Case 5-UC-99

July 16, 1981

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Thomas M. Lucas of the National Labor Relations Board on 68 days between February 6 and December 11, 1978. Following the close of the hearing the Regional Director for Region 5 transferred this case to the Board for decision. Thereafter, the Petitioner and the Employer filed briefs and reply briefs in support of their respective positions.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the Board finds:

- 1. The parties stipulated and we find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
- 2. The labor organization involved claims to represent certain employees of the Employer.
- 3. The Employer is a Delaware corporation engaged at its Washington, D.C., location in the publication and distribution of a daily and Sunday newspaper. The Employer has since 1936 recognized the Petitioner (Guild) as bargaining representative of—and from 1946 to March 31, 1976, has entered into successive collective-bargaining agreements with it for—a unit of employees in the Employer's editorial, news, advertising, circulation, and business departments. By agreement of the parties, the contractual unit has at all times excluded specified "ranking executives, their assistants and their confidential secretaries." Pursuant to a Board-conducted election in 1976, in Case 5-RC-9593, the Guild became the certified bargaining representative of the said unit.

The instant proceeding arises from the Guild's filing of a unit clarification petition on July 17, 1977, in which it seeks to accrete 37 individuals, employed in *confidential secretary* classifications, who did not vote or attempt to vote in the representation election. The Guild's position favoring accretion is twofold. It initially argues that they are

no longer excludable as confidential employees, as defined by the Board's holding in B. F. Goodrich Company, 2 and that the petition otherwise meets the Board's criteria³ for clarification insofar as the facts show that the duties and responsibilities of about 25 of the secretaries have undergone recent, substantial change, and that the other 12 are assigned to newly created executive positions. Alternatively, the Guild urges the Board to determine their unit placement because of prejudicial error by the Hearing Officer and the Region in the underlying representation case, which foreclosed litigation of the secretaries' voting eligibility, and because the tally in the election establishes that their votes could not have affected the election outcome. The Employer opposes clarification herein on the grounds that the Guild has failed to prove any significant changes in their work duties as alleged, the petition raises a question concerning representation and should therefore be dismissed, the conduct in the representation case was not prejudicial to the Guild, and it is highly improper to accrete employees into a unit without granting them a role in the selection of their bargaining representative.

In its consideration of this case, and of the Guild's alternative position, the Board has taken official notice of the records made in the following two related proceedings involving the same parties, in Case 5-RC-9593 and 5-UC-90, which form the background and context for the instant petition.

Case 5-RC-9593

On January 28, 1976, the Washington Newspaper Union, herein called WNU, filed a representation petition for the contractual unit historically represented by the Guild. The Guild intervened in that proceeding based on its contractual interest. At the hearing on the WNU's petition, which began in April 1976, the Employer was permitted to adduce a considerable amount of testimony in support of its contention to exclude about 150 former unit

¹ We find, for the reasons set forth *infra*, that the Petitioner has not been prejudiced by the Hearing Officer's ruling revoking *subpoenas ad testificandum* which prevented testimony by some of the individuals employed in the classifications in dispute. Accordingly, we deny its motion to reopen the record herein.

^{2 115} NLRB 722, 724 (1956).

³ Union Electric Company, 217 NLRB 666 at 667 (1975), where the Board's policy with respect to the propriety of unit clarification petitions is stated as follows:

Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category—excluded or included—that they occupied in the past.

⁴ The WNU petition's unit description, in pertinent part, is as follows: All employees including part-time employees who work 15 or more hours weekly employed by the Employer in its editorial, news, advertising, circulation and business departments of the newspaper, but excluding ranking executives and their assistants and confidential secretaires.

members from the unit in the Board-conducted election because of their alleged supervisory, managerial, or confidential status. During the course of that hearing on May 27, the WNU filed a motion with the Hearing Officer to stay further consideration of the unit placement issues until after the election. The Hearing Officer, after consulting with the Regional Director for Region 5, solicited the parties' agreement to a Stipulation for Certification Upon Consent Election in the existing contractual unit, including an agreement not to challenge any disputed employees in return for the Regional Director's agreement to entertain a post-election clarification petition as to the eligibility issues raised by the Employer. The Employer and WNU were agreeable to that arrangement, but the Guild opposed it. Nonetheless, the Hearing Officer granted the motion and closed the hearing on that same day. Subsequently, on June 4, 1976, the Regional Director for Region 5 issued his Decision and Direction of Election,⁵ pursuant to which an election was conducted on July 17, 20, and 21, 1976.6 The Guild won the election and was certified as bargaining representative on July 29, 1976.7

Case 5-UC-90

On August 17, 1976, the Employer filed its own unit clarification petition, seeking to exclude approximately 150 former unit employees because of their alleged supervisory, managerial, or confidential status. At the hearing on that petition upon the conclusion of the Employer's evidence, in midJune 1977, the Guild first attempted to litigate inclusion of noncontinuity part-time employees and the confidential secretaries to ranking executives. The Employer moved for exclusion of such evidence, and the Hearing Officer therein granted the Em-

All employees employed by the Washington Post in its editorial, news, advertising, circulation and business departments at its Washington, D.C. location, but excluding all other employees, confidential employees, managerial employees, guards and supervisors as defined in the Act.

The Regional Director stated in his decision that "The unit, stipulated to by the parties, conforms to the one covered by the recently expired contract between the Employer and the [Guild]." We note, however, that the unit was not in fact stipulated to by the Guild, and that this unit description differs from the contractual unit description in that it makes no reference to confidential secretaries or the (noncontinuity) part-time employees.

ployer's motion. The Guild thereupon filed for special permission to appeal from the Hearing Officer's ruling, and the Employer filed a statement in opposition thereto. The Regional Director for Region 5 granted the special permission to appeal, but denied the Guild's appeal "without prejudice to the Union's right to file an appropriate petition to determine representation or eligibility status of the employees in dispute." That ruling by the Regional Director led to the filing of the instant petition on July 17, 1977.

The Instant Proceeding

Following the Guild's petition, the Employer filed a motion with the Regional Director for dismissal of this unit clarification petition on the ground that it raises a question concerning representation; i.e., inclusion of classifications which have been excluded historically and whose incumbents have not participated in the election. The Acting Regional Director for Region 5 denied the Employer's motion and ordered the instant hearing based on his finding that, "insofar as the petition concerns alleged changes in the status and working conditions of [the confidential secretaries], it raises issues that can best be resolved on the basis of record testimony." The Board, on February 2, 1978, denied the Employer's request for review of the Acting Regional Director's decision to conduct a hearing herein.9 Accordingly, a hearing was held, following which the Region transferred the case to the Board for decision.

A substantial portion of the hearing was devoted to argument between the parties with respect to the scope of the hearing; 10 i.e., the relevance of the basis for originally excluding the confidential secretaries from the contract unit, rather than for introduction of evidence which the Board finds dispositive of unit clarification: namely, whether the positions in issue have undergone substantial change since their prior unit placement, or whether there are newly created positions which are so different from the former classifications as to justify altering their unit placement.

⁵ The Regional Director's unit description is as follows:

ployees.

⁶ The Employer filed an *Excelsior* list prior to the election which omitted the names of its confidential secretaries; the Guild contested the *Excelsior* list, submitted many additional names for inclusion thereon, but did not propose the names of any confidential secretaries. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966).

⁷ The tally of ballots showed 445 votes for the Guild, 315 for WNU, 28 against representation, and 25 challenged ballots.

⁸ The Board subsequently issued its decision, in Case 5-UC-90 (254 NLRB No. 14 (1981)), in which it found that 44 individuals were not statutory employees and accordingly clarified those individuals out of the certified unit.

⁹ The Board denied the Guild's concurrent request for review of the Acting Regional Director's dismissal of the instant clarification petition insofar as it sought to include noncontinuity part-time employees; consequently, no issue is pending herein as to them.

The Guild subpensed all of the current confidential secretaries and ranking executives involved herein to appear and testify; however, its inquiry of confidential secretaries was confined to their current duties rather than to alleged changes. The Employer thereupon moved to quash the subpense of the remaining secretaries. The Hearing Officer and the Regional Director ruled that the Guild would have to proffer sufficient reasons—pertaining to changes in duties—prior to calling any other secretaries as witnesses. The Guild has not shown, in support of its motion to reopen the hearing because of the said ruling, how it was prejudiced in the presentation of its case. We therefore find that the said ruling on the subpense was not prejudicial error.

Our examination of the record discloses that the Guild's initial basis for clarification—that the confidential secretaries were, but no longer are, confidential employees, and that their work duties have significantly changed from the time of their exclusion from the unit to the present—is unsupported by the evidence. The testimony adduced with respect to the duties and responsibilities of the confidential secretaries in the earlier years is somewhat vague and uncertain. However, it appears that individuals classified as confidential secretaries traditionally have worked for top echelon executives, such as heads of departments, for whom they did typing, transmitting, handling, and maintaining of such confidential information as news sources, interdepartmental correspondence and memorandum pertaining to personnel actions and changes, company expansion plans, and budgetary information and forecasting. The record evidence, however, does not specify the roles of these secretaries, or their bosses, with respect to labor relations policies and procedures; thus, there is no showing that the confidential secretaries were confidential employees in fact. At most, there is testimony which indicates that some Guild representatives may have mistakenly believed that they were confidential employees and were excluded from the unit for that reason.11 The record similarly fails to support the Guild's contention that the bosses of the secretaries in issue have undergone diminished responsibilities, particularly in the areas of discussion and resolution of grievances, recommendations with respect to collective-bargaining negotiations, and participation in the budgetary process, the latter because of the formation of a budget committee. The executives testified to the contrary, and stated that they had more opportunity and exercised more authority in dealing with the Guild regarding grievances and other matters, and with respect to their input into contract negotiations since 1973 under current Labor Relations Director Wallace, than they experienced during the tenure of Lawrence Kennelly, Wallace's predecessor. Likewise, the testimony by executives revealed that the presence of a budget committee, which apparently has since been disbanded, had the effect of increasing their authority by eliminating the need for their having specific accountability for budget line items.

As to the approximately 12 executive positions which the Guild asserts are newly created, the record shows that at least 9 of these positions antedated the 1976 election, and most were in existence

at the time of the 1974 contract negotiations. Two of the remaining three positions, namely vice president comptroller and classified advertising sales manager, involved promotions of already excluded ranking executives whose secretaries were also already in excluded classifications, while the third position, employee benefits director, was created as a higher job because of the Employer's expanded insurance and other benefit programs. As it is clear on this record that the newly created executives occupy higher positions and command greater, not lesser, authority than formerly, the evidence does not support the Guild's contention that the work functions of confidential secretaries to these newly created executives have changed to resemble more closely those of unit secretaries. Thus, we find, from the foregoing, that the Guild, as the petitioning party, has not met its burden of establishing some compelling reasons, i.e., significant changes resulting from recent, substantial changes, or newly created positions, for altering the unit placement of the confidential secretaries who have been excluded historically from the unit by agreement of the parties. In these circumstances, we conclude, in agreement with the Employer, that the Guild's petition raises a question concerning representation which may not be resolved in a unit clarification petition.12 We shall therefore dismiss the instant unit clarification petition.

We now turn to the Guild's further argument for processing its clarification petition, based on the Region's premature closing of the representation case hearing, which prevented litigation of the secretaries' voting eligibility, and thereby prejudicially denied the Guild and confidential secretaries their respective representation rights, and because the election tally shows that the secretaries' votes could not have changed the outcome of the election. In response to the Guild's allegation of prejudicial error, the Employer points out that the Guild's argument appears to be a mere afterthought, in view of the Guild's failure to raise any voting eligibility issues, appeal the Hearing Officer's ruling, or object to the secretaries' omission from the Employer's Excelsior list prior to the election. The Employer further contends that accretion in these circumstances is highly improper because the secretaries were not afforded any opportunity to vote in the representation election.

We agree that the closure of the representation case hearing without fully litigating the unit placement issues was erroneous. However, we do not

Whether their exclusion was based on mistake or acquiescence, rather than express consent by the Guild, is immaterial for purposes of deciding whether clarification is appropriate. Union Electric Company.

¹² See, e.g., Monongahela Power Company, 198 NLRB 1183 (1972).

view that lapse as prejudicial, ¹³ or as a warrant for casting aside the Board's usual criteria for clarifying recognized or certified bargaining units, such as we have earlier set forth herein. ¹⁴ And, irrespective of whether the Guild had more diligently

pressed its position at the election stage, we would not attempt to rectify the Region's error at the cost of what the Board has traditionally regarded as paramount, namely, the Section 7 right of employees to participate in the selection of their bargaining representative. Accordingly, as we have found that the instant petition raises questions concerning representation which are not cognizable in unit clarification proceedings, we shall dismiss the petition without prejudice to the filing of a representation petition hereinafter.

ORDER

It is hereby ordered that the petition in Case 5-UC-99 be, and it hereby is, dismissed.

¹³ By the Board's earlier affirmance, on review, of the Acting Regional Director's refusal to order a hearing as to clarification of the noncontinuity part-time employees, about whose voting eligibility the Guild had similarly contended was foreclosed by closure of the same representation hearing, the Board has previously ruled in effect that the Region's handling of the underlying representation proceeding was not prejudicial to the Guild.

¹⁴ By contrast with the Board's decision in the companion clarification case (5-UC-90), which describes that proceeding as "clearly an offshoot of the earlier RC hearing," 254 NLRB No. 14, we note that, unlike this case, that clarification petition was intended to exclude statutory exclusions and was filed pursuant to previously raised unit issues by the Employer at the representation case hearing.